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7 HERMAN TAMRAT,
8 Plaintiff,
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10 v.
11 ROBERT SCHREEDER, et al.,
12 Defendants.

Case No. 20-cv-01323-PJH

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28 **ORDER OF DISMISSAL WITH LEAVE
TO AMEND**

Plaintiff, a state prisoner, proceeds with a pro se civil rights complaint under 42 U.S.C. § 1983. He has been granted leave to proceed in forma pauperis.

DISCUSSION

STANDARD OF REVIEW

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only ""give the defendant fair notice of what the . . . claim is and the grounds upon which it rests. . . ."" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted). Although in order to state a claim a complaint "does not need detailed

1 factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment]
2 to relief' requires more than labels and conclusions, and a formulaic recitation of the
3 elements of a cause of action will not do. . . . Factual allegations must be enough to
4 raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550
5 U.S. 544, 555 (2007) (citations omitted). A complaint must proffer "enough facts to state
6 a claim to relief that is plausible on its face." *Id.* at 570. The United States Supreme
7 Court has recently explained the "plausible on its face" standard of *Twombly*: "While legal
8 conclusions can provide the framework of a complaint, they must be supported by factual
9 allegations. When there are well-pleaded factual allegations, a court should assume their
10 veracity and then determine whether they plausibly give rise to an entitlement to relief."
11 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

12 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
13 elements: (1) that a right secured by the Constitution or laws of the United States was
14 violated, and (2) that the alleged deprivation was committed by a person acting under the
15 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

16 **LEGAL CLAIMS**

17 Plaintiff alleges that he was illegally arrested and prosecuted, and defendants
18 used excessive force during the arrest.

19 **Legal Standards**

20 An allegation of the use of excessive force by a law enforcement officer in
21 effectuating an arrest states a valid claim under 42 U.S.C. § 1983. See *Rutherford v. City*
22 *of Berkeley*, 780 F.2d 1444, 1447 (9th Cir. 1986), *overruled on other grounds by Graham*
23 *v. Connor*, 490 U.S. 386 (1989); see also *Byrd v. Phoenix Police Dep't*, 885 F.3d 639,
24 641-42 (9th Cir. 2018) (pro se allegations that police officers "beat the crap out of" plaintiff
25 and caused him severe injury enough to support a legally cognizable claim under §
26 1983). Excessive force claims which arise in the context of an arrest or investigatory stop
27 of a free citizen are analyzed under the Fourth Amendment reasonableness standard.
28 See *Graham v. Connor*, 490 U.S. 386, 394-95 (1989).

1 A claim of unlawful arrest is cognizable under § 1983 for violation of the Fourth
2 Amendment's prohibition against unreasonable search and seizure if the complaint
3 alleges that the arrest was without probable cause or other justification. See *Pierson v.*
4 *Ray*, 386 U.S. 547, 555-558 (1967); *Yousefian v. City of Glendale*, 779 F.3d 1010, 1014
5 n.1. (9th Cir. 2015) (absence of probable cause is essential element of § 1983 false
6 arrest claim). And a claim of unlawful detention/imprisonment is cognizable under § 1983
7 for violation of the Fourteenth Amendment's guarantee of due process if the arrest was
8 without probable cause or other justification and the defendant knew or should have
9 known that plaintiff was entitled to release. See *Baker v. McCollan*, 443 U.S. 137, 142-
10 145 (1979); *Lee v. County of Los Angeles*, 250 F.3d 668, 684-85 (9th Cir. 2001) (plaintiff
11 stated due process claim where police allegedly arrested plaintiff's son without probable
12 cause, detained him without verifying that he was the person for whom police had an
13 arrest warrant, despite his obvious mental incapacity, and detained him for one day
14 before extradition hearing, which led to his incarceration in another state for two years).
15 *But cf. Gant v. County of Los Angeles*, 772 F.3d 608, 619, 621-22 (9th Cir. 2014)
16 (because plaintiff did not inform defendants of his mistaken identity and because he
17 received a prompt hearing, his due process claim based on unlawful post-arrest detention
18 failed).

19 In order to recover damages for an allegedly unconstitutional conviction or
20 imprisonment, or for other harm caused by actions whose unlawfulness would render a
21 conviction or sentence invalid, a 42 U.S.C. § 1983 plaintiff must prove that the conviction
22 or sentence has been reversed on direct appeal, expunged by executive order, declared
23 invalid by a state tribunal authorized to make such determination, or called into question
24 by a federal court's issuance of a writ of habeas corpus. *Heck v. Humphrey*, 512 U.S.
25 477, 486-487 (1994). A claim for damages bearing that relationship to a conviction or
26 sentence that has not been so invalidated is not cognizable under § 1983. *Id.* at 487.

27 In *Wallace v. Kato*, 549 U.S. 384, 393 (2007), the Court held that the "Heck rule for
28 deferred accrual is called into play only when there exists 'a conviction or sentence that

1 has not been . . . invalidated,' that is to say, an 'outstanding criminal judgment.'" *Id.* at
2 391-93 (quoting *Heck*, 512 U.S. at 486-87). The *Heck* rule delays accrual only if there is
3 an existing conviction on the date the statute of limitations begins to run, which in the
4 case of wrongful arrest or wrongful imprisonment claims is when the plaintiff's
5 confinement is no longer without legal process, but rather becomes a confinement
6 pursuant to legal process – that is, for example, when he or she is bound over by a
7 magistrate or arraigned on charges. *Id.* at 389-90. The Court stated that the contention
8 that "an action which would impugn an *anticipated future conviction* cannot be brought
9 until that conviction occurs and is set aside" goes "well beyond *Heck*" and rejected it. *Id.*
10 at 393 (italics in original). Although the Court was only considering when the statute of
11 limitations began running on a false arrest/false imprisonment claim, the discussion
12 quoted suggests that *Heck* does not apply if there is no extant conviction – for instance, if
13 plaintiff has only been arrested or charged.

14 If a plaintiff files a § 1983 false arrest claim before he or she is convicted, or files
15 any other claim related to rulings that likely will be made in a pending or anticipated
16 criminal trial, it is within the power of the district court, and accords with common practice,
17 to stay the civil action until the criminal case or the likelihood of a criminal case is ended.
18 *Id.* at 393-94. If the plaintiff is then convicted, and if the stayed civil suit would impugn
19 that conviction, *Heck* requires dismissal; otherwise, the case may proceed. *Id.* at 394.

20 Local governments are "persons" subject to liability under 42 U.S.C. § 1983 where
21 official policy or custom causes a constitutional tort, see *Monell v. Dep't of Social Servs.*,
22 436 U.S. 658, 690 (1978); however, a city or county may not be held vicariously liable for
23 the unconstitutional acts of its employees under the theory of respondeat superior, see
24 *Board of Cty. Comm'r's. of Bryan Cty. v. Brown*, 520 U.S. 397, 403 (1997); *Monell*, 436
25 U.S. at 691. To impose municipal liability under § 1983 for a violation of constitutional
26 rights resulting from governmental inaction or omission, a plaintiff must show: "(1) that he
27 possessed a constitutional right of which he or she was deprived; (2) that the municipality
28 had a policy; (3) that this policy amounts to deliberate indifference to the plaintiff's

1 constitutional rights; and (4) that the policy is the moving force behind the constitutional
2 violation.” *Oviatt By and Through Waugh v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992)
3 (quoting *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (internal quotation marks
4 omitted). Proof of random acts or isolated incidents of unconstitutional action by a non-
5 policymaking employee are insufficient to establish the existence of a municipal policy or
6 custom. See *Rivera v. County of Los Angeles*, 745 F.3d 384, 398 (9th Cir. 2014).¹

7 **Background²**

8 Plaintiff states that he was in an altercation with a security guard at a shopping
9 mall that led to plaintiff being pepper sprayed by the security guard and the Santa Rosa
10 Police Department being called. He states that police officers arrived and with guns
11 drawn ordered him to get on the ground. Plaintiff did not comply, but he did place his
12 backpack on the ground to show a form of submission. Before being approached by
13 police officers, plaintiff stated that he couldn’t breathe and needed help due to the pepper
14 spray.

15 Plaintiff states that defendant Police Officer Albini approached plaintiff and even
16 though plaintiff cooperated, Albini used excessive force in grabbing plaintiff’s arms and
17 wrists and placing him on his stomach. Plaintiff states that Albini placed his knee with a
18 great deal of pressure on the back of plaintiff’s back and back of his neck. Plaintiff was
19 then handcuffed. Defendant Police Officer Rhodes placed plaintiff’s legs in a twisted leg
20 lock compression that made it difficult to breathe. Plaintiff states that the excessive force
21 led to injuries and pain.

22 Plaintiff states that defendant Police Officer Pietrelli illegally searched and
23 recovered a knife from plaintiff and then continued to search plaintiff and scattered his

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25 ¹ Section 1981 provides that “[a]ll persons within the jurisdiction of the United States shall
26 have the same right in every State and Territory to make and enforce contracts, to sue,
27 be parties, give evidence, and to the full and equal benefit of all laws and proceedings for
the security of persons and property as is enjoyed by white citizens, and shall be subject
to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to
no other.” 42 U.S.C.S. § 1981(a). Section 1981 is not relevant to the facts in the
complaint.

28 ² Plaintiff cites to several exhibits, but no exhibits were attached to the complaint.

1 belongings on the ground. Plaintiff was then put in a seated position where an
2 unidentified police officer forcefully grabbed plaintiff's sweater and yanked on it causing
3 plaintiff to have more difficulty breathing. He states that defendant Police Officer Wanger
4 observed the incident and did not intervene.

5 Plaintiff was then transported to the hospital, but without his personal belongings.
6 At the hospital, Rhodes told plaintiff that the police viewed video footage from the
7 shopping center which showed plaintiff chasing the security guard with a knife and that
8 the security guard was injured. Plaintiff states that he did make an involuntary statement,
9 but he was intimidated and is innocent. Plaintiff also states that he later reviewed police
10 reports that were obtained through discovery and Rhodes was biased in his police
11 reports and falsely charged plaintiff.

12 Plaintiff states his rights were violated under the Fourth, Eighth and Fourteenth
13 Amendments and he seeks relief pursuant to 42 U.S.C. §§ 1981, 1983, 1985, *Monell* and
14 related state laws. Plaintiff also states that his due process rights were violated at many
15 illegal court proceedings and his criminal trial on September 25, 2019.

16 **Discussion**

17 Plaintiff presents many allegations and causes of action in his complaint including
18 several troubling allegations of excessive force. Plaintiff has presented sufficient
19 allegations of excessive force against Albini and Rhodes. However, the complaint is still
20 dismissed with leave to amend to provide more information for the court to determine if
21 the claims may proceed at this time.

22 Plaintiff states that there was a criminal trial in September 2019, but it is not clear
23 the result of the trial. Plaintiff is currently incarcerated in state prison, but it is also not
24 clear if that is related to the underlying incident in the action. If plaintiff was convicted,
25 then many of his claims may not proceed pursuant to *Heck* unless the conviction has
26 been reversed or expunged. Depending on the criminal charges against plaintiff, it is
27 possible that the excessive force claims could continue if this civil rights action would not
28 imply that his conviction was invalid. If the criminal prosecution is continuing, then this

1 case may be stayed. In an amended complaint plaintiff should describe the current
2 status of the criminal prosecution, what were the charges against him, and what charges
3 he was convicted of, if any.

4 With respect to the *Monell* claim, plaintiff must present more information showing
5 that his rights were violated by a municipal policy that was deliberately indifferent to his
6 constitutional rights.³

7 CONCLUSION

8 1. The complaint is **DISMISSED** with leave to amend in accordance with the
9 standards set forth above. The amended complaint must be filed no later than **July 6,**
10 **2020**, and must include the caption and civil case number used in this order and the
11 words AMENDED COMPLAINT on the first page. Because an amended complaint
12 completely replaces the original complaint, plaintiff must include in it all the claims he
13 wishes to present. See *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). He may
14 not incorporate material from the original complaint by reference. Failure to file amended
15 complaint may result in dismissal of this action.

16 2. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the
17 court informed of any change of address by filing a separate paper with the clerk headed
18 "Notice of Change of Address," and must comply with the court's orders in a timely
19 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute

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³ Forty-two U.S.C. § 1985(3) provides a cause of action against state or private
23 conspiracies. See *Griffin v. Breckenridge*, 403 U.S. 88, 101-02 (1971). A cause of action
24 under § 1985(3) requires a showing of some racial or class-based discrimination, but only
25 the first clause of § 1985(3) requires intent to deprive victims of the equal protections of
26 the laws. See *Kush v. Rutledge*, 460 U.S. 719, 724-26 (1983). The elements of a claim
27 under the first clause of § 1985(3) are: (1) the existence of a conspiracy to deprive the
28 plaintiff of the equal protection of the laws; (2) an act in furtherance of the conspiracy;
and (3) a resulting injury. See *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1141 (9th Cir.
2000). "A mere allegation of conspiracy without factual specificity is insufficient."
Johnson v. California, 207 F.3d 650, 655 (9th Cir. 2000) (quoting *Karim-Panahi v. Los
Angeles Police Dep't.*, 839 F.2d 621, 626 (9th Cir. 1988), overruled on other grounds by
Johnson v. California, 543 U.S. 499 (2005)). Plaintiff must provide more allegations to
continue with this claim.

1 pursuant to Federal Rule of Civil Procedure 41(b).

2 **IT IS SO ORDERED.**

3 Dated: June 4, 2020

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5 /s/ Phyllis J. Hamilton

6 PHYLLIS J. HAMILTON
7 United States District Judge

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